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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 829

CLARENCE P. BERKHEISER,

Petitioner,

vs.

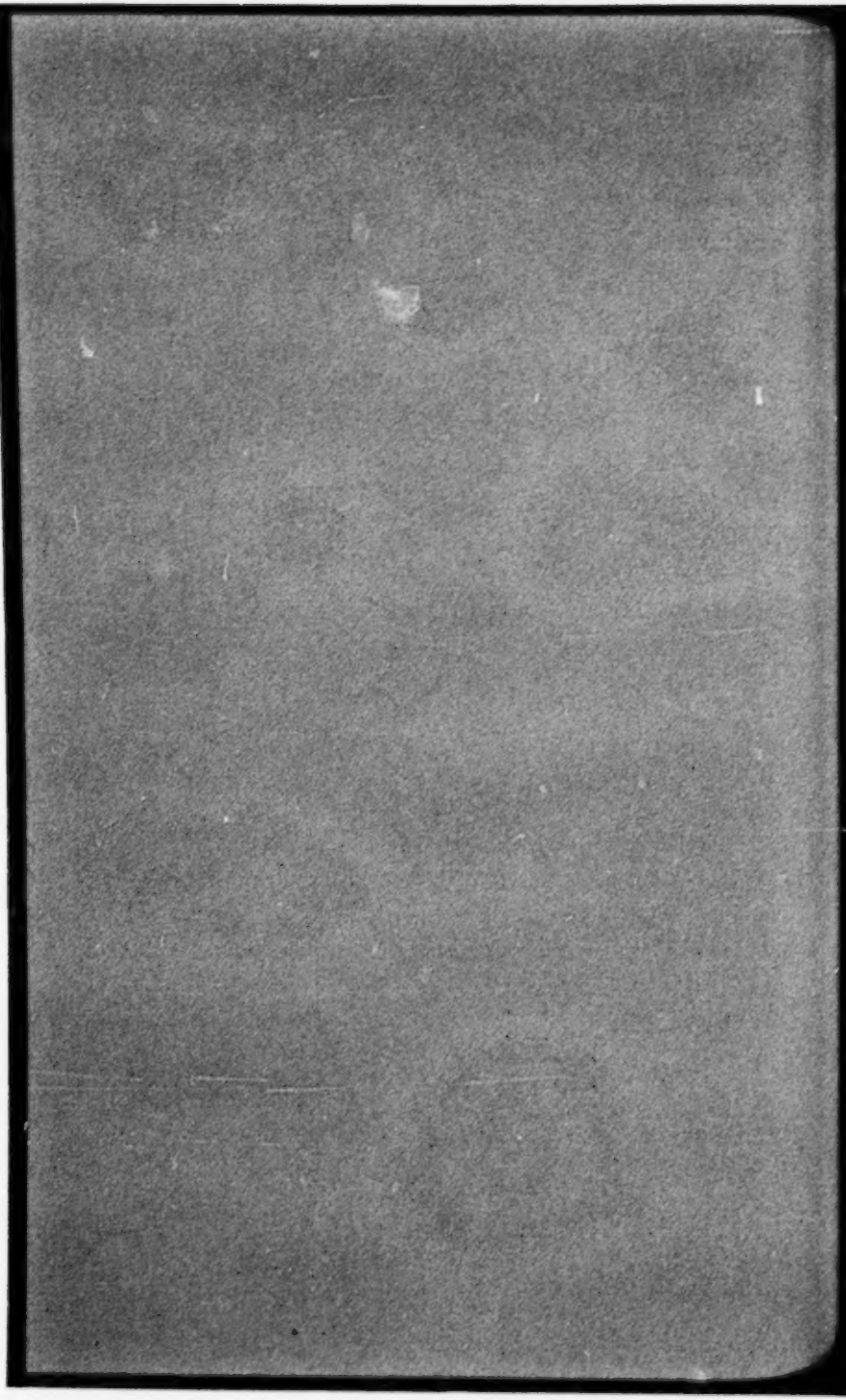
HONORABLE PAUL JONES,
Judge of the United States District Court for the Northern District of Ohio, Eastern Division,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

ELMER I. SCHWARTZ,
700 Union Commerce Bldg.,
Cleveland 14, Ohio,
Counsel for Petitioner.

THE BAYNE LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-0547



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In the Supreme Court of the United States

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CLARENCE P. BERKIHISER,

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vs.

HONORABLE PAUL JONES,
Judge of the United States District Court for the Northern District of Ohio, Eastern Division,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Sixth Circuit.

Clarence P. Berkihiser, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on January 13, 1956, which denied a petition for a writ of mandamus to direct the respondent to nullify an order of transfer previously issued by the respondent pursuant to 28 U. S. C. 1404(a).

OPINIONS BELOW.

The opinion of the Court of Appeals (*infra*, Appendix A, p. 12) is not officially reported.

The memorandum opinion of Judge Jones on the motion to transfer the action in the District Court to the United States District Court for the Western District of Pennsylvania is dated January 3, 1956. The opinion is not officially reported, but is printed *infra*, Appendix B, p. 12.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 13, 1956 (*infra*, Appendix A, p. 12). The jurisdiction of this Court invoked under the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether Section 1404(a) of the Judicial Code (28 U. S. C. 1404(a)) empowers a district judge to restrict without limit the venue selection of an injured workman suing under the Federal Employers' Liability Act by directing a transfer to another district in the absence of substantial grounds therefor.

2. Whether under Section 1404(a) a district judge may grant a motion to transfer a cause to another district mainly because of the crowded condition of the docket, where the facts otherwise require that the motion be denied.

3. Whether, under the power to issue all necessary writs (28 U. S. C. 1651(a)), a writ of mandamus should issue to correct an order of transfer made by the district judge outside the bounds of proper legal discretion.

STATUTES INVOLVED.

The suit in the district court was instituted under the provisions of the Federal Employers' Liability Act, 45 U. S. C. Section 51 et seq. The venue provisions of the Federal Employers' Liability Act are contained in Section 6 thereof (45 U. S. C. 56), which reads as follows:

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of

the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

The order of transfer was issued by the District Court upon the claimed authority of Section 1404(a) of the Judicial Code (28 U. S. C. 1404(a)), which reads as follows:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Jurisdiction of the Court of Appeals was invoked pursuant to Section 1651(a) of the Judicial Code (28 U. S. C. 1651 (a)), which reads as follows:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT.

The petitioner, while employed in interstate commerce by The Pennsylvania Railroad Company at Conway, Pennsylvania, sustained personal injuries on November 30, 1953 as a result of the alleged negligence of the railroad. Petitioner brought an action against The Pennsylvania Railroad Company pursuant to the Federal Employers' Liability Act.

The action was filed in the United States District Court for the Northern District of Ohio, Eastern Division, and is Civil Action No. 31941 in that Court. The defendant railroad filed a motion to transfer the cause to the

United States District Court for the Western District of Pennsylvania. Its request was based upon Section 1404(a) of the Judicial Code.

In support of its motion to transfer, the defendant railroad submitted the affidavit of Charles F. Clarke, Jr., one of its attorneys (*infra*, Appendix D, p. 13). In opposition to the motion to transfer the plaintiff (petitioner in this action) submitted the affidavit of Howard M. Metzenbaum, one of his attorneys (*infra*, Appendix E, p. 15).

The information contained in the affidavits shows that Beaver, Rochester, Conway and Midland, Pennsylvania, the places referred to in the affidavit submitted on behalf of the defendant railroad, are all within 40 miles of Youngstown, Ohio, one of the places where court is held for the Northern District of Ohio, Eastern Division; and the same towns are also within 100 miles of Cleveland, Ohio. Witnesses in any of the said towns are within the subpoena power of the United States District Court for the Northern District of Ohio, Eastern Division, whether sitting in Youngstown or Cleveland, Ohio.

The railroad's motion to transfer was granted by the Honorable Paul Jones, Chief Judge of the United States District Court for the Northern District of Ohio. In his memorandum opinion (*infra*, Appendix B, p. 12), he stated:

> "It is apparent from the affidavits supporting the instant motion that for the convenience of the parties and the witnesses and in the interest of justice the trial of the action should be transferred to the Western District of Pennsylvania. Motion granted."

On January 10, 1956 petitioner filed in the United States Court of Appeals for the Sixth Circuit a petition for a writ of mandamus to the Honorable Paul Jones, United States District Judge for the Northern District of

Ohio, Eastern Division, respondent herein, directing nullification of the order of transfer made in the case of *Clarence P. Berkihiser v. The Pennsylvania Railroad Company.* On January 13, 1956 the Court of Appeals denied the petition (Order, *infra*, Appendix A, p. 12), citing as authority its opinion rendered the same day in the case of *Myrtle Fannin, Admx. v. Honorable Paul Jones,* 229 F. 2d 368. A petition for a writ of certiorari is being filed concurrently in that case, and it is No. _____ October, 1955 Term, in this Court.

REASONS FOR GRANTING THE WRIT.

The rulings of the courts below illustrate the frequent misconception and misapplication of the effect of *Norwood v. Kirkpatrick,* 349 U. S. 29. In comparing Section 1404(a) with the doctrine of *forum non conveniens,* the opinion of the court, at page 32, explained:

> "As a consequence, we believe that Congress by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience."

Immediately following are the overlooked or ignored words of caution:

> "This is not to say that the relevant factors have changed or that plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

I. Showing of Inconvenience as Basis of Transfer Must Be of Substance, and Not Minimal or Trivial.

The venue privilege granted by Section 6 of the Federal Employers' Liability Act (45 U. S. C. 56) has been held to be a substantial right. *Boyd v. Grand Trunk Western R. Co.,* 338 U. S. 263, 266. The venue section of the

F. E. L. A. was not repealed by Section 1404(a). *Ex parte Collett*, 337 U. S. 55. Hence, in order to overcome plaintiff's substantial right to a choice of forum, the balance of convenience must be strongly in favor of the defendant.

Section 1404(a) was designed and reserved for those instances where the transfer was sought to a district court substantially distant from the district where the action had been instituted. *Jenkins v. Wilson Freight Forwarding Company*, 1952, S. D. N. Y., 104 F. Supp. 422.

All of the decisions of this Court in which orders of transfer have been upheld have involved distances in the hundreds of miles. (*Ex parte Collett, supra*, where the distance involved was some four hundred miles; *Kilpatrick v. Texas and Pacific R. Co.*, where the accident occurred in Texas, but suit was instituted in New York; *Norwood v. Kirkpatrick, supra*, where suit was brought about 600 miles from the place of the accident.) Similar substantial distances were involved in cases decided prior to Section 1404(a), under the doctrine of *forum non conveniens* (*Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, where the distance involved was more than 400 miles; and *Koster v. Lumberman's Mutual Casualty Company*, 330 U. S. 518, where the plaintiff filed suit about 1000 miles away from the scene of the accident).

In this case there is a minute discrepancy in mileage (distances from places referred to in railroad's affidavit are less than 40 miles from Youngstown, and 25-30 miles from Pittsburgh), and in view of the facilities, flexibility and speed of modern transportation the plaintiff should not be deprived of his chosen forum. *Sherman v. Baltimore & Ohio R. Co.*, 1954, W. D. Pa., 122 F. Supp. 492.

The difference of 10-15 miles in distance between trial in Pittsburgh, Pennsylvania as against Youngstown, Ohio is minimal and trivial, when compared with the dis-

tances usually considered on motions to transfer. Even if trial would be had in Cleveland, only an additional 65 miles would be involved. To grant a motion to transfer on such slight showing of inconvenience is in total disregard of the plaintiff's right in his choice of forum, and it therefore amounts to an abuse of discretion.

II. Condition of the Trial Calendar Is Not a Valid Reason for Transfer.

The opinion of the District Judge did not specifically say that transfer was granted because of the overcrowded condition of the docket, as it did in *Myrtle Fannin, admx. v. Honorable Paul Jones, supra.* The opinion merely repeated the words of the statute (Section 1404(a)). However, from his previously expressed attitude on the matter of alleviating the crowded condition of the docket by transfer of cases (see opinion of District Judge in the *Fannin* case), that factor apparently controlled the decision of the District Judge. It, therefore, becomes appropriate to consider the relevancey of docket conditions in determining whether a motion to transfer should be granted or refused.

The fact that a case may be reached promptly in the proposed forum, or that it would take some time to be reached where filed, should not be considered as a valid reason for transfer.

U. S. v. Scott & Williams, Inc. (1950), S. D. N. Y., 88 F. Supp. 531, 535;

Keller-Dorian Colorfilm Corp. v. Eastman Kodak Corp. (1949) S. D. N. Y., 88 F. Supp. 863, 866;

Savoia Films S. A. I. v. Vanguard Films (1950), S. D. N. Y., 10 F. R. D. 64;

Mazinski v. Dight (1951), W. D. Pa., 99 F. Supp. 192, 194;

Ronson Art Metal Works v. Brown & Bigelow (1952), S. D. N. Y., 105 F. Supp. 169, 174, aff. 199 F. 2d 760;

Sherman v. Baltimore & Ohio R. Co. (1954), W. D. Pa., 122 F. Supp. 492, 493.

Where the balance of convenience otherwise favors the action pending in the district in which it was brought, the fact that calendars are crowded or judges overworked does not warrant denial of the court's forum to a litigant (*Ronson Art Metal Works v. Brown & Bigelow, supra,* at p. 174), and parties litigant should not, therefore, be prejudiced by the transitory and variable states of the court's docket. (*Sherman v. Baltimore & Ohio R. Co., supra,* at p. 493.)

Section 1404(a) provides for transfer of an action for the convenience of parties and witnesses, not for the convenience of the court (*Savoia Films S. A. I. v. Vanguard Films, supra,* at p. 67). Therefore, a district court may not order a transfer only to suit its personal convenience (*Keller-Dorian Colorfilm Corp. v. Eastman Kodak Corp., supra,* at p. 866; *Mazinski v. Dight, supra*).

A similar question is now pending before this Court in *LaBuy v. Howes Leather Co., Inc.*, No. 622 October, 1955 Term, certiorari having been granted on February 27, 1956. The decision of the Court of Appeals is reported at 226 F. 2d 703. The matter of crowded dockets was there involved as the district judge referred certain anti-trust cases to a special master under Rule 53(b) of the Federal Rules of Civil Procedure. In issuing a writ of mandamus to compel vacation of the order, Judge Lindley said, at page 709:

"* * * In this day of crowded dockets and voluminous calendars, the position now advanced by respondent, if adopted, would make reference to a master the rule

rather than the exception in every case of a complicated nature which is filed in this district."

If the condition of trial calendars were a proper element of consideration, then practically all applications to transfer from the courts of large cities would have to be granted (*U. S. v. Scott & Williams, Inc., supra,* at page 535). The purpose of the statute should not be tortured, and the choice of forum thereby transferred from the plaintiff to the defendant.

In his dissenting opinion in *Norwood v. Kirkpatrick, supra,* at page 36, Mr. Justice Clark cautioned that the effect of the decision was that the discretion of the district judge under Section 1404(a) would be expanded "to an as yet unstated degree * * *." Although in the majority opinion Mr. Justice Minton, at page 32, did observe that the relevant factors have not changed and the plaintiff's choice of forum is still to be considered, this case highlights the prevalent erroneous conclusion that the district court has *unlimited* discretion in ruling on motions to transfer. It is the contention of the petitioner that the *Norwood* case is not authority for unlimited discretion, but only that the discretion is broader than under *forum non conveniens.* Only under blanket authority to transfer would transfer in this case have been justified.

III. The Court of Appeals Should Have Exercised Its Power to Issue a Writ of Mandamus Pursuant to Section 1651(a) of the Judicial Code.

Almost immediately following the enactment of Section 1404(a) of the Judicial Code, and ever since, the Courts of Appeals have recognized their authority to issue writs of mandamus in cases involving transfer from one district court to another district court.

Ford Motor Co. v. Ryan (1950), C. A. 2, 182 F. 2d 329, cert. den. 340 U. S. 851;
Atlantic Coast Line R. Co. v. Davis (1950), C. A. 5, 185 F. 2d 766;
Shapiro v. Bonanza Hotel, Inc. (1950), C. A. 9, 185 F. 2d 777;
Paramount Pictures, Inc. v. Rodney (1950), C. A. 3, 186 F. 2d 111, cert. den. 340 U. S. 953;
Nicol v. Koscinski (1951), C. A. 6, 188 F. 2d 537;
Wiren v. Laws (1951), C. A. D. C., 194 F. 2d 873;
Chicago, R. I. & P. R. Co. v. Igoe (1954), C. A. 7, 212 F. 2d 378.

Three such cases have reached this Court by grant of writs of certiorari. In each case it was held that a writ of mandamus was not warranted on the facts, and it was therefore unnecessary to pass upon the question of the right to issue a writ of mandamus (*Ex parte Collett*, 337 U. S. 55; *Kilpatrick v. Texas and P. Ry. Co.*, 337 U. S. 75; *Norwood v. Kirkpatrick*, 349 U. S. 29).

In acting on a motion to transfer, the district judge is limited in his consideration to the three factors specifically mentioned in Section 1404(a), and he may not properly be governed in his decision by any other factor or factors (*Dairy Industries Supply Ass'n. v. LaBuy* (1953), C. A. 7, 207 F. 2d 554, 558); but if extraneous matters have become the basis of the decision, mandamus will lie to correct such improper exercise of discretion (*Chicago, R. I. & P. R. Co. v. Igoe, supra*).

Where the district judge has ordered transfer of a case for improper reasons and outside the scope of Section 1404(a), his error can be corrected only by a writ of mandamus. If unauthorized orders of transfer were beyond

the control of the Court of Appeals, the effect would be to deprive litigants of forums to which they are entitled (*Wiren v. Laws, supra*). Such error cannot be corrected by appeal after judgment, and the petitioner would be left with an empty claim of prejudicial denial of trial in a proper forum.

CONCLUSION.

This case and the *Fannin* case point up how far beyond proper limits of discretion District Courts may go in transferring cases, unless guideposts of interpretation mark the limits of discretion and help to maintain some uniformity of decision in this vitally important procedural aspect of litigation. Parallel and comparable factual situations could easily be subject to opposite rulings by different courts, by various judges of the same court, and even by the same district judge in successive cases.

The improper and groundless transfer of a civil action may and should be corrected by a writ of mandamus. Moreover, the issues involved in this case transcend the denial of the rights of one litigant. Motions to transfer are filed and ruled upon almost daily in many district courts. Error compounded and multiplied is a matter of utmost judicial importance. This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

ELMER I. SCHWARTZ,
Counsel for Petitioner.

Dated: Cleveland, Ohio,
April 5, 1956.

APPENDIX A.

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered Jan. 13, 1956.)

The petition for a writ of mandamus is denied. See *Myrtle Fannin, Administratrix of the Estate of Zeb Fannin, Deceased v. Honorable Paul Jones,* No. 12774, decided this date.

APPENDIX B.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

(Filed Jan. 3, 1956.)

JONES, *J.:*

It is apparent from the affidavit supporting the instant motion that for the convenience of the parties and the witnesses and in the interest of justice the trial of the action should be transferred to the Western District of Pennsylvania.

Motion granted.

/s/ JONES,

United States District Judge.

APPENDIX C.

ORDER OF THE DISTRICT COURT GRANTING MOTION FOR CHANGE OF VENUE.

(Filed January 5, 1956.)

Upon consideration, it is ordered that defendant's motion for a change of venue is hereby granted.

IT IS, THEREFORE, ORDERED that this cause be transferred to the United States District Court for the Western District of Pennsylvania.

/S/ JONES,

Chief Judge.

APPENDIX D.

AFFIDAVIT OF CHARLES F. CLARKE, JR.

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

CHARLES F. CLARKE, JR., being first duly sworn, deposes and says:

(1) That he is one of the attorneys engaged by defendant, The Pennsylvania Railroad Company, to defend the above entitled cause in the District Court of the United States for the Northern District of Ohio, Eastern Division, and as such he is familiar with the investigation file furnished by the Claim Department of the defendant covering the facts and circumstances surrounding the alleged accident which forms the basis of plaintiff's claim as set forth in his complaint.

(2) That said investigation discloses that plaintiff never reported his alleged accident of November 30, 1953

to the defendant and that the first knowledge that defendant had of any injury being claimed by plaintiff was upon receipt of a notice of lien from Howard M. Metzenbaum, Esq., counsel of record for plaintiff under date of November 8, 1954, whereupon defendant caused an investigation to be made and determined, that all of the persons working with or near plaintiff on November 30, 1953, including plaintiff's immediate supervisor, were and are residents of Conway, Pennsylvania and vicinity. Any corroborating testimony secured by plaintiff as to the facts of his alleged accident and any testimony by defendant disputing plaintiff's testimony must come from persons who were then and are now residents of the Western District of Pennsylvania.

(3) That from time to time after said alleged accident plaintiff claims to have been treated by certain doctors in and around Conway, Pennsylvania and Rochester, Pennsylvania (Rochester, Pennsylvania being three or four miles from Conway), including plaintiff's own family physician, a Dr. Hooker of Rochester, Pennsylvania. Plaintiff has also been examined by doctors in Pittsburgh, Pennsylvania at the request of, for and on behalf of defendant; that plaintiff's counsel claims that plaintiff has been seen by at least one doctor in Cleveland, Ohio, but admits that this doctor was retained by plaintiff's counsel and merely examined plaintiff for the purpose of testimony at the trial rather than treatment.

(4) That the attendance at the trial of all the witnesses who are likely to be called by either plaintiff or defendant in this case can be compelled by subpoena if the case is tried in the Western District of Pennsylvania and that the attendance at trial of none of such witnesses can be compelled at Cleveland, Ohio. That the voluntary

attendance of medical witnesses will be difficult to obtain if the case is tried at Cleveland, Ohio, while the voluntary attendance of such witnesses can be readily obtained if the case is tried in the Western District of Pennsylvania.

(5) That defendant is a common carrier by railroad, organized and existing under and by virtue of the laws of Pennsylvania and operates many miles of railroad in the Western District of Pennsylvania and is subject to process in that district.

Further affiant saith not.

/S/ CHARLES F. CLARKE, JR.
Charles F. Clarke, Jr.

(Verification omitted.)

APPENDIX E.

AFFIDAVIT AND MEMORANDUM BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE.

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

Howard M. Metzenbaum, being first duly sworn according to law, says that:

1. He is the attorney for the plaintiff in the within action. This action has been brought under the provisions of the Federal Employers' Liability Act to recover damages for serious injury to his back which the plaintiff sustained on November 30, 1953, while he was employed as a machinist in defendant's enginehouse at Conway, Pennsylvania.

2. The only persons having any knowledge of the facts concerning the accident were and are employees of the defendant railroad.

3. Following his injury, plaintiff was treated by doctors in Beaver, Rochester and Midland, Pennsylvania. On November 5, 1954, plaintiff was examined in Cleveland by Dr. Wallace Duncan, orthopedic surgeon, and Dr. Nelson E. Klamm, radiologist.

4. Beaver, Rochester, Conway and Midland, Pennsylvania are within a few miles of each other, are all within 100 miles of Cleveland, and are all within 40 miles of Youngstown.

5. Defendant's railroad lines and trains run directly from Pittsburgh, Pennsylvania, through Rochester and Beaver Falls, Pennsylvania, and to Youngstown and Cleveland. The defendant's scheduled train time between Rochester, Pennsylvania and Cleveland is two hours; and defendant's scheduled train time between Rochester, Pennsylvania and Youngstown, Ohio is one hour.

6. Except for defendant's physicians in Pittsburgh, all of the potential witnesses in this case are within 100 miles of this Court sitting in Cleveland, within 40 miles of this Court sitting in Youngstown, and within the subpoena power of this Court.

/S/ HOWARD M. METZENBAUM.

(Verification omitted.)

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Judge of the United States District Court for the Northern District of Ohio, Eastern Division,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

GEORGE H. P. LACEY,
CHARLES F. CLARKE, JR.,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9547

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Respondent, the Honorable Paul Jones, Chief Judge of the United States District Court for the Northern District of Ohio, Eastern Division, files herewith his brief in opposition to the petition for a writ of certiorari heretofore filed by petitioner in the above-entitled cause.

OPINIONS BELOW.

Respondent is satisfied with the presentation of petitioner on this point.

JURISDICTION.

Respondent objects to the exercise of jurisdiction by this Court on the ground that the writ of mandamus, which petitioner sought in the United States Court of Appeals for the Sixth Circuit, and from the denial of which writ

he has petitioned here for a writ of certiorari, did not lie within the power of the Court of Appeals to grant in this case.

QUESTIONS PRESENTED.

Respondent is dissatisfied with the presentation of petitioner on this point and submits herewith a counter-statement of the questions presented for review as follows:

1. Did the United States Court of Appeals for the Sixth Circuit, in the case at bar, have the power to issue a writ of mandamus under 28 U. S. C. 1651(a) to, in effect, reverse the judgment of the respondent who, as a United States District Judge, had already exercised his discretion under 28 U. S. C. 1404(a) to transfer the venue of an action?

2. Did the respondent, as United States District Judge for the Northern District of Ohio, Eastern Division, so abuse the discretion vested in him under 28 U. S. C. 1404(a) by ordering an action then pending before his court transferred to the United States District Court for the Western District of Pennsylvania, that the Court of Appeals should exercise the drastic and extraordinary remedy of mandamus to, in effect, reverse his judgment?

STATUTES INVOLVED.

Respondent does not believe that 45 U. S. C. 56 is involved in this matter and, as above stated, does not believe that 28 U. S. C. 1651(a) granted the Court of Appeals the statutory authority to issue a writ of mandamus in the case presented by petitioner to that court. Otherwise, respondent is satisfied with the presentation of petitioner on this point.

STATEMENT.

Respondent disputes that portion of petitioner's statement which deals with the distances between Cleveland, Ohio, and, respectively, Beaver Falls, Rochester and Conway, Pennsylvania. There is a variance between the affidavits of plaintiff's and defendant's counsel as to whether these distances are greater or less than 100 miles. If it is considered material, this Court can take judicial notice of these distances as lower courts have done, *Munson S. S. Lines v. Newman*, 24 F. (2d) 416 (C. C. A. Fifth Cir. 1928); *Merchant Bank of New York v. Grove Silk Co.*, 15 Fed'l. Rules Serv. 812 (Dist. Ct. Mid. Dist. Pa. 1951).

Otherwise, respondent is satisfied with the presentation of petitioner on this point.

REASONS FOR NOT GRANTING THE WRIT.

A. Where Respondent, in the Case at Bar, in the Exercise of His Statutory Discretion, Under Section 1404(a) of the Judicial Code (Title 28, U. S. C.), Has Granted a Motion For Change of Venue, a Court of Appeals Does Not Have the Power to Issue a Writ of Mandamus.

Respondent does *not* assert, in this case, that the United States Court of Appeals for the Sixth Circuit lacks the power in any case to issue a writ of mandamus under Section 1651(a) of Title 28. Respondent does contend that the Court of Appeals lacked this power in this case because there has been no showing made by petitioner that this is an extraordinary cause.

The facts shown by petitioner are that a District Judge has transferred a cause of action from his district to the district where the cause of action arose, which is *also* the district where plaintiff resides. All of the wit-

nesses to the incident giving rise to plaintiff's cause of action live in the district to which the case has been transferred as do most of the medical witnesses. These facts are not disputed.

The importance of the home forum to a plaintiff has been recognized by this Court, *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U. S. 518 at 524, and described in some detail, *Norwood v. Kirkpatrick*, 349 U. S. 29, dissenting opinion of Clark, *J.* at pp. 41-42. In the case at bar, by transferring the cause of action to plaintiff's own forum and to the district where the accident occurred, respondent has simply recognized what this Court has heretofore considered as of importance.

It has been repeatedly held that mandamus is an extraordinary remedy which should be reserved for extraordinary causes. See, for example, Rule 30 of the Revised Rules of this Court (as amended to Oct. 11, 1955). In *Ex Parte Fahey*, 332 U. S. 258, this Court said at pp. 259, 260, as follows:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes."

And while this Court has expressly reserved ruling on the appropriateness of mandamus in the Section 1404(a) cases heretofore before it, it has certainly implied that a very strong case would be required before manda-

mus would issue, *Ex Parte Collett*, 337 U. S. 55, at 72, wherein it was said:

> "*Fifth.* Since the petition for mandamus and prohibition must be denied because of the view we must take as to the meaning of § 1404(a) and its applicability to this case, we need not decide whether denial might be placed on other grounds also. 'Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies * * *. As extraordinary remedies, they are reserved for really extraordinary causes.' *Ex parte Fahey*, 332 U. S. 258, 259, 260 (1947)." (p. 72.)

This is by no means such a cause.

B. There Is No Evidence That the Respondent Abused His Discretion in Transferring the Within Cause.

Most of the petitioner's brief is taken up with an argument over a fictitious issue. There was not one word in the record before him or in his opinion or in his judgment that indicates that respondent's decision was based on the crowded condition of his docket. There are other cases pending where such may be an issue, but not in this case.

Even without *Norwood v. Kirkpatrick, supra*, respondent's ruling transferring a cause of action to its situs and plaintiff's home forum would have been justified under the older *forum non conveniens* rule, *Ex Parte Collett, supra; Kilpatrick v. Texas & Pacific R. Co.*, 337 U. S. 75. Under the *Norwood* case doctrine where the discretion of respondent has been concededly broadened (petitioner's brief, p. 9, *Norwood*, p. 32), there is simply no substantial fact before this Court which supports petitioner's charge that respondent exercised "unlimited" discretion.

CONCLUSION.

Respondent in the case at bar exercised his statutory discretion to transfer a cause of action from the district wherein it was filed to the district wherein it arose. The district to which it was transferred is also the district of plaintiff's residence. These facts, standing alone, would have been sufficient justification for the transfer under *forum non conveniens* and are overwhelmingly sufficient under the rule announced in *Norwood v. Kirkpatrick, supra.*

It is respectfully submitted that for the foregoing reasons petitioner's petition for a writ of certiorari should be denied

Respectfully submitted,

GEORGE H. P. LACEY,
CHARLES F. CLARKE, JR.,
Counsel for Respondent.

Dated Cleveland, Ohio

May 1, 1956.